87-255

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MAGD E. ZOHDI, QUALITY CONTRACTING AND SERVICES INC., ET AL — PETITIONERS

VERSUS

THE FEDERAL SAVINGS AND LOAN INSURANCE CORP. AS RECEIVER OF SUN BELT FEDERAL BANK, F. S. B. — RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the FSLIC has adjudicatory power under 12 U.S.C. 1464(d)(6)(c) and 1729(d) and Article III of the Constitution to determine all claims against the failed savings and loan in receivership, regardless of the nature of the claim; and adjudicatory power to determine all claims against the FSLIC and Federal Home Loan Bank Board in their individual capacities.

2. If FSLIC does have such power, are the courts divested of all jurisdiction upon failure of the savings and loan?

3. If FSLIC does have such power, what is the standard of review under the Administrative Procedures Act?

4. Even if FSLIC does have adjudicatory power, is the FSLIC and the Bank Board estopped to exercise such power as a result of the actions of the savings and loan and the Bank Board immediately prior to failure?

PARTIES TO THE PROCEEDINGS

Magd. E. Zohdi
Quality Contracting and Services, Inc.
Quality-Standard Joint Venture
Commercial Building Supply, Inc.
J.F. Naylor and Co.
George Bonfanti
Gerald E. Fackrell, Jr.
V. James Stewart
Noel "Butch" Baum and Janet F. Baum
BFC VIII, Ltd.
Harry Adcock
Larry Tullos
James Dodds
Louisiana Public Facilities Authority
Cameron Brown Mortgage Corp.
American Bank and Trust Co.
Metropolitan Bank and Trust Co.
Approximately 79 sub-contractors and material suppliers on
Jefferson Lakes Apartment complex
Approximately 92 sub-contractors and material suppliers on
Essen Centre office building
Federl Savings and Loan Insurance Corporaiton, individually
and as receiver of Sun Belt Federal Bank, F.S.B.
Federal Home Loan Bank Board

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IN THE
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OCTOBER TERM, 1987

NO.

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER OF SUN BELT FEDERAL BANK, F.S.B., RESPONDENT

VERSUS

GEORGE M. BONFANTI, GERALD E. FACKRELL, JR., ET AL.
PETITIONERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Magd E. Zohdi, Quality Contracting and Services, Inc., Commercial Building Supply, Inc., and Quality-Standard Joint Venture repectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 8, 1987.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

OPINIONS BELOW

The opinion of the Court of Appeals was an unpublished opinion pursuant to Local Rule 47.5. A copy of the opinion is attached hereto as Appendix A. A copy of the opinion of the United States District Court for the Middle District of Louisiana ordering compliance with its December, 1985 judgment, and Exhibit "A" of that judgment, is attached hereto as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was enterred on May 8, 1987. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254(1).

STATUTES INVOLVED

This Case involves the interpretation of 12 U. S. C. 1464(d)(6)(C) and 1729(d) as follows:

1464(d)(6)(C) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator

or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

1729(d) In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

STATEMENT OF THE CASE

In 1984, Sun Belt Federal Bank, F.S.B. (Sun Belt) made two large construction loans secured by mortgages on two real estate project in Baton Rouge, Louisiana. One loan for a total of $10.8 million was for construction of Jefferson Lakes Apartments, with four individuals as owners and borrowers, the second loan for $8.3 million was for construction of a multi-story office building known as Essen Centre; both involving the same general contractor, Bonfanti-Fackrell.

Apparently without checking progress, Sun Belt advanced substantially all of the funds on each project. When the two projects went into default, each was only fractionally completed.

Sub-contractors, materialmen and laborers filed liens on each project; Sun Belt, now under the supervisory jurisdiction of the Federal Home Loan Bank Board (Bank Board), filed a R.I.C.O. suit against the borrowers, contractors,

architects and related parties; and the borrowers filed suits against Sun Belt. In subsequent actions, criminal charges were brought against former Sun Belt officers.

In December 1985, Judge Frank J. Polozola of the U.S. District Court for the Middle District of Louisiana agreed to assist in an effort to settle all of the related actions. Various conferences were had between the parties to those lawsuits, the various lien holders, participating banks, and other non-parties who would be affected by the outcome.

All discussions culminated in an extensive settlement agreement that was approved by the Bank Board both orally and in writing, which judgment was then read into the Court record on December 23, 1985. This settlement agreement is designated as Exhibit "A" of the District Court's January, 1987 Judgment, a copy of which is attached hereto as Appendix B.

The settlement agreement, approved in writing by the Bank Board, provided that Sun Belt would drop all of its claims against the borrowers, contractor, and land owners, including R.I.C.O. claims; that those parties would drop all claims against Sun Belt; that the lien holders would cancel their liens and drop all claims against Sun Belt, the owners, the contractor, and the borrowers; that Sun Belt would get title to the properties; that Sun Belt would pay the lien holders a portion of their claim on Jefferson Lakes and Essen Centre; and that Sun Belt would contract with two of the largest lien holders to complete construction of the two projects, using the remaining lien holders as sub-contractors where feasible. In connection with the contract, the new general contractors were to receive a first mortgage on the properties to guarantee performance by Sun Belt.

The parties and non-parties acted together to get the suits and liens cancelled. The new construction contract for Jefferson Lakes was drafted and a copy was sent to the Bank Board for its approval. Sun Belt received from the Bank Board written authorization to sign the contract on April 30, 1986; the contract was signed on April 30; the last liens were cancelled on April 30; and an act was recorded transferring title from the four owners to Sun Belt. On May 1, the general contractors were ordered by Sun Belt to start work, which they did.

However, also on May 1, with full knowledge of all of these events, the Bank Board made the decision to close Sun Belt and appoint FSLIC as receiver, which was accomplished on May 2, 1986.

The December 23, 1985 settlement agreement regarding Essen Centre required several conditions precedent before work could resume;

however, as the owner was (and still is) in bankruptcy, many of those conditions have failed to occur, thus that project has remained at a total standstill from the summer of 1985 to today.

Sun Belt/Bank Board/FSLIC obtained ownership of the apartment property, they obtained cancellation of liens and lawsuits, they have benefited by additional work by the new general contractor, and they have obtained many other benefits regarding Jefferson Lakes. The only action they have taken to uphold their portion of the bilateral agreement was to reluctantly pay the $900,000. They have not paid the remaining $300,000., they have not paid for the new general contractor's work done to date in good faith under the April 30 contract, they have refused to provide the new general contractor its mortgage, and they have refused to allow work to progress on the project to protect it from the elements. As a result, the project, which is composed of

unfinished wooden structures, has deteriorated drastically since May 1, 1986, due solely to the gross neglect by the FSLIC to properly protect the asset.

Following FSLIC's failure to resume construction under its agreement, the new general contractor and the former lien holders filed a motion in the district court to compel compliance with that court's December 23, 1985 order. Following a hearing, the District Court ruled that it had jurisdiction to adjudicate and enforce its own judgment, with civil and criminal contempt penalties if required, and ordered compliance on December 19, 1986 (See Appendix B). FSLIC, one of the parties to the judgment by virtue of the receivership of Sun Belt, argued that the District Court lost jurisdiction of this entire matter upon the failure of Sun Belt.

On appeal, the United Statees Court of Appeals for the Fifth Circuit ruled that under

the case law of the Fifth Circuit, on May 1, 1986, Judge Polozola lost subject matter jurisdiction over Sun Belt. Petitioners seek writs to this Honorable Court to review that ruling of the Fifth Circuit.

To summarize important dates:

March 21 and June 20, 1985 - Sun Belt put under supervisory jurisdiction of Federal Home Loan Bank Board, C.R. Brooks, Supervisory Agent.

December 23, 1985--Settlement reached in Federal District Court.

January 7, 1986--Bank Board's December 23 oral approval of settlement confirmed in writing by Brooks.

April 29, 1986--new Jefferson Lakes Construction contract approved in writing by Brooks.

April 30, 1986--Last lien cancelled, transfer of title to property completed, construction contract signed by bank and new general contractors.

May 1, 1986-Contractors advised in writing to proceed, work begun; FSLIC appointed receiver of Sun Belt by Federal Home Loan Bank Board.

May 2, 1986--Sun Belt closed by FSLIC.

May 16, 1986--Contractors advised to cease

work under contract; however, they were not paid for this new work.

December 19, 1986--All parties ordered to comply with terms of the December 23, 1985 judgment; work resumed by contractors.

January 8, 1987--Stay granted by Fifth Circuit; work stopped by contractors; however, they were not paid for this new work.

REASONS FOR GRANTING THE WRIT

The opinion of the Fifth Circuit in the Bonfanti-Fackrell case is in direct conflict with the Ninth Circuit Court of Appeals interpretation of 12 U.S.C. 1464(d)(6)(C) and 1729(d). See Morrison-Knudsen Co., Inc. v. CHG International, Inc. 811 F. 2d 1209 (9th Cir. 1987).

Section 1464(d)(6)(C) provides that "no court may . . . restrain or affect the exercise of power or functions of a conservator or receiver." and Section 1729(d) provides in part that:

> In connection with the liquidation of insured institutions in default, the receiver shall have power . . . to settle, compromise, or release claims in favor of or against the injured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the . . . other public authority having jurisdiction over the matter.

The Fifth Circuit has interpreted those sections to divest federal courts of subject matter jurisdiction over all claims against savings and loans until the FSLIC completes its administrative claims process.

See North Mississippi Savings & Loan Assn. v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985), cert. denied, and Chupik Corp. v. FSLIC, 790 F.2d 1269 (5th Cir. 1986).

The Fifth Circuit stated its position in Hudspeth:

> "Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities."

In its reasoning in the Bonfanti-Fackrell case at bar, the Fifth Circuit cited its Hudspeth and Chupik decisions and simply stated "Hudspeth is too clear-- there are no end runs around the receiver's broad realm of authority." The Fifth Circuit made this decision by memorandum opinion without even affording the parties the privilege of an oral arguement before the panel.

However, the Fifth Circuit was aware of Morrison-Knudsen, as it chose to disregard the contrary decision in a footnote:

"3.Morrison-Knudsen simply refused to follow Hudspeth's holding and cited no intervening Supreme Court precedent as guiding its choice of position."

From reading the Court's reasons, it thus appears that the Fifth Circuit applied the Hudspeth case without considering the very unique aspects and circumstances surrounding FSLIC's involvement in the first place and Sun Belt's lack of privity of contract with the lien claimants until they were no longer lien holders but only unsecured creditors of the savings and loan on April 30, 1986.

It appears that the Fifth Circuit also failed to recognize or address whether the FSLIC or the Bank Board were affected by the theory of equitable estoppel, which should apply to this case and is set forth as follows:

"Equitable estoppel may be defined as the effect of the voluntary conduct of a party whereby he is precluded from asserting rights against another who

> has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. Founded upon good faith, the doctrine is designed to prevent injustice by barring a party, under special circumstances, from taking a position contrary to his prior acts, admissions, representations, or silence."
> American Bank & Trust Co. v. Trinity Universal Insurance Co., 205 So. 2d 35 (La. 1967):

All of the lien claimants changed their positions (cancelled liens and released personal actions) based upon the representations of Sun Belt, a representation that was approved in writing by the Bank Board and suggested by a Federal Judge; and because of their reliance, the lien holders changed their position to their detriment.

The Fifth Circuit may also have failed to recognize that the delay in this case is seriously destroying on asset. The apartment buildings were wood structures mostly unprotected from the weather. The delay caused by FSLIC

inaction and carelessness has resulted in millions of dollars of damage to the buildings and land.

The Fifth Circuit, by reversing solely based upon Hudspeth, may not have realized that the action in the court below did not involve a mere contract, claim or lawsuit. The actions below had been reduced to a final judgment of a United States district judge. Sun Belt and the Bank Board consented to a judgment whereby various parties and non-parties received benefits and gave up rights in order to put an end to complicated litigation. Once the settlement was reduced to judgment, they cannot be permitted to declare "King's X" and back out of the judgment. See White Farm Equipment v. Kupcho 729 F. 2d 526 (5th Cir. 1986).

In Morrison-Knudsen the Ninth Circuit specifically rejected Hudspeth and the Fifth Circuit's interpretation of 12 U.S.C. 1464 (d)(6)(C) and 1729(d) for basically five reasons:

1. Congress did not give FSLIC power to adjudicate. FSLIC is only a receiver; adjudication of core matters is reserved to Article III courts.

2. The standard of review of FSLIC claims is not clearly set forth by the statutes.

3. FSLIC is involved in the claims process in many different capacities.

4. Requiring parties to go through the administrative process may be too time consuming.

5. As FSLIC cannot itself adjudicate, it must appear before the courts just like anyone else involved in a dispute.

1. Power to adjudicate

The Fifth Circuit in Hudspeth and in FSLIC vs. Bonfanti-Fackrell reasoned that judicial resolution of claims would delay the receivership function and is thus a "restraint" of FSLIC. The Ninth Circuit in Morrison-Knudsen stated that 1464(d)(6)(C) does not add to FSLIC's receivership powers, it simply prohibits a court from interfering with them. The Ninth Circuit determined that:

> "...a receiver's ordinary functions do not include adjudication. Judicial adjudication, to repeat, does not restrain or affect a receivership; it simply determines the existence and amount of claims that a receiver is to honor in its eventual distribution of assets.
>
> * * *
>
> FSLIC's basic contention is that Congress intended the agency's receivership powers to go beyond those of an ordinary receiver. It has not established its case. Hudspeth in effect permitted section 1464(d)(6)(C) to expand FSLIC's receivership authority. We decline to do so.

* * *

> FSLIC is no more an adjudicator under this regulation than is an insurance company authorized to "disallow" any claim not proved to its satisfaction and required to notify claimants thereof. The administrative process that the regulations prescribes authorizes FSLIC and the Board, by disallowance of a claim and notice to the claimant, to determine whether a dispute exists. It does not empower FSLIC to resolve the dispute with the force of law."

The Ninth Circuit compared FSLIC's claimed powers with those of the FDIC and found that no court or statute has vested FDIC with the "ultimate power to adjudicate creditor's claims."

Regarding Sections 1464 and 1729, the Ninth Circuit held that:

> "A bare duty to pay debts does not imply the power to decide finally, subject only to review under the Administrative Procedure Act, what debts must be paid.

* * *

> In addition, we note that the statute, by explicitly authorizing FSLIC to "settle, compromise, or release" claims delineates powers that not only are distinguishable from the power to adjudicate but are to some extent incompatible with it. Settlement and compromise strongly suggest the presence of the power of the other party to take the dispute to court. Settlement and compromise are to avoid that result.
>
> * * *
>
> The entire statutory framework strongly suggests that Congress intended FSLIC to be a receiver, not an adjudicator. Had it intended the latter, we are confident it would have given substantial attention to the procedural and substantive rights of claimants as well as the rights, duties, and responsibilities of FSLIC."

Regarding the powers that were conferred upon FSLIC by Congress, the Ninth Circuit noted that the statutory framework and powers regarding the supervision of ongoing savings and loans occupy several pages of the United States Code,

giving "detailed, exact, and comprehensive measures precisely delineating agency procedure, the remedies available, and judicial review", while the statutory framework giving FSLIC adjudicatory power and duties is contained in the very short paragraphs of Sections 1464(d)(6)(C) and 1729(d):

> "The inference is irresistible that had Congress any intention of permitting FSLIC to adjudicate in its capacity as receiver, similar provisions--or provisions having a similar purpose--would have been enacted. Indeed, it is unreasonable to conclude that, although FSLIC and the Board are painstakingly circumscribed in adjudicating cases in their supervisory role, as to which their administrative expertise is greatest, neither is circumscribed in adjudicating as receiver."

The Morrison-Knudsen court then stated that it could not "sweep under the rug" the serious constitutional difficulties that attend FSLIC's assertion of adjudicatory jurisdiction. The court in looking to the substance of the rights

at issue, found it plausible that each of the creditors' claims presented a private right, and therefore, a claim assumed to be at the core of matters normally reserved to Article III courts.

As in Morrison-Knudsen, your petitioners are not asking the courts to interfere in FSLIC's duties. Everyone gave up rights under the settlement. They merely want FSLIC to honor the committment of the Bank Board and allow them to complete the project. FSLIC would then be free to take whatever steps it felt appropriate to utilize or dispose of its completed assets.

2. The standard of review

The Ninth Circuit noted the problems of determining the proper standard of appellate review of the findings by FSLIC, citing Northern Pipeline Construction Co. v. Marathon Pipe Line Co. 458 v.s. 50 (1982).

In Morrison-Knudsen the FSLIC took the position that should FSLIC have adjudicatory

power, its findings of fact would be reviewable under the "weight of the evidence" test. However, the Ninth Circuit was not sure.

> "In the absence of specific congressional direction, review would proceed according to the Administrative Procedure Act, under which the 'arbitrary and capricious' standard might well be applicable, ..., or at best the 'substantial evidence' standard, ..., which still is more deferential then 'weight of the evidence' review."

Rather than becoming involved in this potential constitutional question, the Ninth Circuit held simply that FSLIC was not given adjudicatory power by Title 12:

> "It is not necessary for us to pass on these matters. We reject FSLIC's interpretation because it raises these 'serious' constitutional difficulties, which the statutes can quite 'fairly be read' to avoid. Schor, 106 S. Ct. at 3252. It may be that with careful limitations like those governing FSLIC's adjudication of regulatory violations, Congress could have crafted an adjudicatory jurisdiction for FSLIC in its receivership capacity

> that would pass constitutional muster. We are convinced it has not attempted to do so."

3. Multiple entities

The Ninth Circuit recognized the inherent difficulties and conflicts that arise when the FSLIC is appointed receiver of a failed institution.

It noted that FSLIC is the supervisor of a failing institution; the receiver once it in fact fails; the custodian of its assets; an insurer of deposits; and thus the single largest creditor of the institution; a defendant when claims are brought against the failed institution, its officers or assets; and lastly, judge and sole finder of fact in regards to claims by and against the institution.

It is the last "hat" FSLIC sought to wear which concerned the Ninth Circuit the most. And, despite all of the other conflicts of interest and multiple personalities, it is only this last

role, that of judge, which the Ninth Circuit found to be beyond the powers of FSLIC.

Those conflicts of interest are all present in the Bonfanti-Fackrell case. The FSLIC/Bank Board was the supervisor of Sun Belt on April 29 and 30. FSLIC became the receiver of Sun Belt on May 1 and custodian of its assets on May 2. As insurer of deposits, FSLIC also became a major creditor of Sun Belt on May 2. Now the FSLIC/Bank Board is not only defendant to the claims by the unfortunate lien claimants, but FSLIC and the Bank Board will become judge of the trial court and court of appeals in determining the merits of those very claims. Surely Hudspeth did not envision creating such an overwhelming and unfair conflict of interest.

4. Delay

The main concern of the Fifth Circuit in Hudspeth and Bonfanti-Fackrell was with the delay caused by judicial determination of claims, and

the perceived adverse effect of such delay on the liquidation process. However, inordinate delay in liquidation of claims is inherent in most FSLIC receiverships. This delay was the point on which the Ninth Circuit was most critical of the Fifth Circuit's Hudspeth decision:

> "The Hudspeth court reasoned that judicial 'resolution of even the facial merits of claims...would delay the receivership function of distribution of assets' and that 'such a delay is a 'restraint' within the scope of the statute,' Hudspeth, 756 F.2d at 1102. The court held that FSLIC had exclusive original jurisdiction to adjudicate creditors claims, subject only to judicial review under the Administrative Procedure Act. Id. at 1103. We reject this reasoning.
>
> First, its logic is flawed. If judicial review, which will delay--perhaps by years--the liquidation process, does not restrain or affect a receiver, then why does initial adjudication by a court of creditors' claims do so? Hudspeth provides no answer. Section 1464(d)(6)(C) does not speak in terms of the magnitude of such restraint or effect.
>
> Second, and more important, section

> 1464(d)(6)(C) does not add to FSLIC's receivership powers; it simply prohibits courts from interfering with powers, which FSLIC must derive from other statutory sources. Thus the essential question under section 1464(d)(6)(C) is whether FSLIC's receivership 'powers or functions' include adjudication of creditor claims. Yet the Hudspeth opinion makes no reference to any statutory language or legislative history indicating a congressional intent to confer adjudicatory power upon FSLIC in its receivership capacity. What has not been conferred cannot be derived by pointing to the time consuming tasks that FSLIC as a receiver must undertake. At bottom FSLIC merely asserts that it could do its job faster and more efficiently if it had adjudicatory power. Perhaps true, but if Congress did not provide that adjudication would be among FSLIC's receivership functions the agency may not use section 1464(d)(6)(C) to achieve that result." (emphasis added).

Such delay will occur in Bonfanti-Fackrell. It has been over fifteen months since the appointment of FSLIC as receiver, but no claims have been "adjudicated" by FSLIC. Once those claims are finally determined adverse to the

claimants, the appeal will be to the Bank Board under the Administrative Procedures Act. Following that determination affirming the FSLIC, appeal will then be back to the U.S. District Court, back to the court of appeals and untimately back to this honorable court. As noted by the Ninth Circuit, such a convoluted process surely will restrain the liquidation process. Unfortunately, by that time the asset in question will no longer exist as it will have been long since condemned.

5. FSLIC as a party

The Ninth Circuit's holding was that "...FSLIC has no power to adjudicate creditor claims." (emphasis added)

Due to this holding, the Ninth Circuit summarized:

> "As receiver for failed associations, however, FSLIC stands in the shoes of the insured institution. It takes over assets and liabilties, and it

> assumes full operational control in its own name. It is empowered and indeed obliged to pay all valid depositors' and creditors' claims up to certain limits in orderly fashion and without immediate judicial supervision. It may settle or release these claims with the consent of claimant parties as it sees fit in order to accomplish this task more efficiently. But when a claim is disputed and agreement cannot be reached. FSLIC is obliged to attend court just as the institutions it represents would have had to do." (Emphasis added).

The claims of the lien claimants are indeed disputed and agreement cannot be reached. FSLIC and the lien claimants attended court, and the court ruled in favor of the lien claimants. That decision is consistent with the Ninth Circuit in Morrison-Knutsen, but directly opposite the Fifth Circuit in Hudspeth. That conflict of the circuits and the harsh result that befalls a creditor in the Fifth Circuit is the main reason writs should be granted herein.

CONCLUSION

The opinion of the Fifth Circuit in this case interpreting 12 U.S.C. 1464(d)(6)(C) and 1729(d) and Article III of the Constitution conflicts with the Morrison-Knutsen Co. v. CHG International decision out of the Ninth Circuit. In view of the rising number of thrift and savings and loan failures in this country and increasing involvement of the FSLIC, it is obvious that courts will be called upon to interpret those sections in the future. Petitioners respectfully submit that certiorari should be granted in this case to resolve the conflict in the Circuit courts regarding the scope of Sections 1464(d)(6)(C) and 1729(d) and Article III.

Also, if the Hudspeth line of cases from the Fifth Circuit is indeed the law, should the

FSLIC/Bank Board be estopped from asserting same herein due to the very unique circumstances of this particular case?

Respectfully submitted:

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RESPONDENT

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GEORGE M. BONFANTI,
GERALD E. FACKRELL, JR., ET AL.,
PETITIONERS

PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

Robert V. McAnelly, after being duly sworn, deposes and says that pursuant to Rule 28 of this Court, he has served the Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit on counsel for the respondent by enclosing a copy thereof in an envelope, first class postage prepaid, properly addressed to:

1. William R. Pitts
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3. Harry W. Quillian
General Counsel,
Federal Home Loan Bank Board
1700 "G" Street, N.W.
Washington, D.C. 20552

and depositing same in the United States mail at Baton Rouge, Louisiana, on the _____ day of August, 1987.

_____
ROBERT V. McANELLY

Sworn to and subscribed before me, this _____ day of August, 1987, at Baton Rouge, Louisiana

_____
NOTARY PUBLIC
My Commission is for Life.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3012

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION As Receiver of Sun Belt Federal Bank, F.S.B.,

Plaintiff-Apellant,

versus

GEORGE M. BONFANTI, GERALD E. FACKRELL, JR., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the

Middle District of Louisiana

(CA-85-903-B)

(May 8, 1987)

Before GOLDBERG, POLITZ, and HILL, Circuit Judges.
ROBERT M. HILL, Circuit Judge:

The Federal Savings and Loan Insurance Corporation (FSLIC), acting as receiver for Sun Belt Federal Bank, F.S.B. (Sun Belt), appeals the district court's order requiring it to carry out prereceivership settlement agreement between Sun Belt and several other parties. For the reasons given below, we reverse and remand with instructions to dismiss for lack of subject matter jurisdiction.

I.

In 1984 Sun Belt made substantial construction loans for two real estate developments in Baton Rouge, Louisiana. The borrowers failed to repay the loans and the two real estate projects were not completed. As can be imagined, numerous lawsuits arose out of these delinquencies.

Several unpaid contractors and materialmen filed suit in Louisiana state courts against the borrowers for payment of services rendered and for materials supplied. The borrowers led by George Bonfanti and Gerald Fackrell filed suit in

Louisiana state court against Sun Belt for breach of contract.[1] The instant federal case began when Sun Belt filed suit aginst Bonfanti, Fackrell, and others alleging fraudulent diversion of loan proceeds, breach of contract, and violations of federal law. In an attempt to resolve all the disputes arising out of the loans and real estate projects, the district court convened a settlement conference between Sun Belt, the borrowers and other persons and entities claiming an interest in the entire affair. The settlement discussions therefore included persons and

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1. During this eruption of lawsuits one of the borrowers, "BFC-8" also filed for relief under the United States Bankruptcy Code.

entities not parties to Sun Belt's federal action. After lengthy negotiations, a settlement agreement was achieved. In general the settlement provided that Sun Belt would receive title to the real estate projects and that the lienholders on the projects would release their claims for partial payments made by Sun Belt. In regard to Jefferson Lakes Apartments, the settlement provided that Sun Belt could complete it and that the building lienholders would perform the work on agreed upon terms. In regard to Essen Center, Sun Belt was obligated to complete the outer construction for $850,000. In December 1985 the district court approved the agreement.

Partial performance of the agreement occurred. Sun Belt received title to one of the projects, Jefferson Lakes, and made the requisite payment to the lienholders who then released their claims. On May 1, 1986, Sun Belt signed a 5.5 million dollar contract with the original

contractors of the Jefferson Lakes project for completion of the project. But again the project would not meet with success.

On the same day the construction contract was signed, the Federal Home Loan Bank Board (the Bank Board) determined that Sun Belt was insolvent. The Bank Board appointed the FSLIC receiver for Sun Belt. Upon learning of the May 1st contract for the Jefferson Lakes project, the FSLIC notified the contractors not to begin work.

In late May 1986 the district court held a status conference to determine whether the settlement agreement was being performed. The FSLIC at this point asserted that the district court no longer had jurisdiction to enforce the settlement or adjudicate claims arising from it, and, accordingly, moved to dismiss the case. Other adherents to the settlement requested the district court hold FSLIC in contempt for failing to perform the settlement. In December 1986 the district court denied the receiver's motion to

dismiss and ordered it to comply with the settlement, namely to complete the Jefferson Lakes project. The FSLIC perfected a timely appeal to this court.[2] We have jurisdiction pursuant to 28 U.S.C. Sec. 1291, 1292 (a) (1).

II.

This case is controlled by the broad powers bestowed upon a receiver of an insolvent financial institution by Congress. Title 12 U.S.C. Sec. 1464 (d) (6) (C) provides that "no court may . . . restrain or affect the exercise of power or function of a conservator or receiver" Likewise, Congress has provided that

> In connection with the liquidation off insured institutions in default, the receiver shall have power . . . to settle, compromise, or release claims

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2 On January 8, 1987, we stayed the district court's December 1986 order and expedited the consideration of this appeal.

> in favor of or against the injured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the . . . other public authority having jurisdiction over the matter.

12 U.S.C. Sec. 1729 (d).

We have interpreted these sections as divesting federal courts of subject matter jurisdiction over all claims against thrift receiverships until the administrative claims process involving those claims is completed. See North Mississippi Savings & Loan Ass'n v. Hudspeth, 756 F. 2d 1096, 1102 (5th Cir. 1985), cert. denied, 106 S. Ct. 790 (1986); see also Chupik Corp. v. Federal Savings & Loan Insurance Corp., 790 F.2d 1269 (5th Cir. 1986). In formulating this divestive rule, we stated in Hudspeth:

> Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving

> a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities.

756 F.2d at 1101. Furthermore, in Chupik we emphasized the breadth of section 1464's language and Hudspeth's holding by stating:

> [W]e re-emphasize that "resolution of even facial merits of claims outside the statutory reorganization process" is a "restraint" with the scope of section 1464 and thus is to be avoided.

790 F.2d at 1270 (citing Hudspeth, 756 F.2d at 1102).

To restate yet again, upon the appointment of a receiver, herein the FSLIC, all claims against the insolvent thrift, herein Sun Belt, are "switched to the administrative track, pursuant to 12 U.S.C. Sec. 1464(d) (6) (C)", Hudspeth, 756 F.2d at 1103, and a federal court loses subject matter jurisdiction over the claims.

The FSLIC has begun the administrative process on claims asserted against Sun Belt. That process is not yet complete and upon completion is subject to review by the Bank Board and ultimately a federal court. In light of Hudspeth, the district court erred in denying FSLIC's motion to dismiss. Accordingly, we reverse that decision and remand with instructions to dismiss this action.

III.

Hudspeth is too clear -- there are no end runs around the receiver's broad realm of authority. That realm of authority includes the initial administrative evaluation of claims asserted against it or the insolvent thrift.[3] For these reasons, the district court's order is reversed and the cause remanded with instructions to dismiss for lack of jurisdiction.

REVERSED and REMANDED.

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We are aware that the Ninth Circuit in Morrison-Knudson Co. Inc. v. CHG International, Inc., 811 F.2d 1210 (9th cir. 1986) (pet. for rehearing pending), rejected Hudspeth. Morrison-Knudsen simply refused to follow Hudspeth's holding and cited no intervening Supreme Court precedent as guiding its choice of position. We have found no Supreme Court precedent that brings Hudspeth into question; we therefore are bound to follow it as a prior decision of our court regardless of the Morrison-Knudsen decision.

APPENDIX "B"

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

SUN BELT FEDERAL BANK,F.S.B.

versus

GEORGE M. BONFANTI, GERALD E. FACKRELL,JR.,BFC-8 LTD., BONFANTI-FACKRELL HOLDING CORP., LARRY TULLOS, JOHN GRAVES, JAMES DODDS, and HARRY ADCOCK

JUDGMENT

Pursuant to stipulation of counsel dictated into the record of this Court on December 23, 1985, and the evidence, affidavit and stipulations of counsel presented in Open Court on December 19, 1986:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

I. The Motion Regarding Lack of Subject Matter Jurisdiction filed by the Federal Savings and Loan Insurance Corporation as Receiver of Sun Belt Federal, F.S.B. is hereby denied.

II. There be Judgment herein in conformity with said stipulation as dictated into the record of this Court on December 23, 1985, a copy of the said stipulation is attached hereto as Exhibit "A"; and all parties, including the Federal Savings and Loan Insurance Corporation in its capacity as Receiver of

Sun Belt Federal Bank,F.S.B., are ordered to comply with the provisions of this Judgment. JUDGMENT READ, RENDERED AND SIGNED in Open Court, this 5th day of January, 1987, at Baton Rouge, Louisiana.

/s/ Frank J. Polozola
JUDGE,U.S. DISTRICT COURT,
FOR THE MIDDLE
DISTRICT OF LOUISIANA

EXHIBIT "A"
(TO APPENDIX "B")

I. ESSEN CENTRE

A. A joint plan of bankruptcy will be filed in the BFC-8, Ltd. Chapter XI proceeding by Sun Belt, BFC 8, Ltd., and the lien holders essentially presenting a plan as follows:

1. Title to Essen Centre will be vested in Sun Belt or its nominee at no cost to Sun Belt.

2. Sun Belt will pay all claimants, subject to a maximum of $1.3 million, with 70% payable upon a final, definitive judgment confirming the bankruptcy plan and the other 30% payable in three equal installments during construction of the shell, the 30% will be secured by a mortgage on Essen Centre.

3. Lien holders will agree to complete the shell for a maximum of $825,000.00., said price to be guaranteed by Dr. Zohdi and the Standard Naylor Group, Inc. Any amount which Sun Belt must pay in excess of $825,000.00 will be deducted from the 30% payable to lien holders referred in (A)(2) above. Contractors will be a joint venture between

Quality Contracting and Standard Naylor Group, Inc. and/or their assigns.

4. Bonfanti-Fackrell will transfer ownership of the land on which the parking garage encroaches to Sun Belt or its designee, at no cost to Sun Belt.

5. Sun Belt will pay American Bank $70,000.00, and in consideration, will recieve a release of American Bank's and Metropolitan's mortgages; the $70,000.00 will be credited by American Bank to any claim it has against Sun Belt and to any claim it has against BFC-8, Limited.

6. Capital Holding Corporation will receive a release of any claims of BFC-8, Ltd. for recovery of payments previously made, and in consideration, Capital Holding will release all claims for any penalties under the bond issue. If Capital Holding refuses to vote for the plan, its claim will be valued on a liquidation basis, and it will receive the above referred to release, or the value of its claim, whichever is of greater value, subject to the condition referred to below in No. 9.

7. Any payments to the lien

holders, American Bank, and Capital Holding Corporation by Sun Belt, will be funded by means of a super priority, first mortgage at competitive interest rates, to which the existing Sun Belt mortgage will be subordinated.

8. All other liens and encumbrances will be cancelled at the time the property is transferred.

9. The plan will be conditional upon Sun Belt or its nominee getting title free and clear of all encumbrances other than the Sun Belt mortgages, and the mortgage to lien holders securing payment of the 30% remaining on the lien payments, and upon a finding by the Court that the value of Capital Holding's claim is less than $1,000.

B. BFC 8, Ltd. will record a notice of abandonment immediately.

C. As a condition predicate to payment to lien holders, all lien holders must release Sun Belt and its prior and present officers, employees, and directors from any claims arising out of the Essen Centre project.

II. JEFFERSON LAKES

A. Title to Jefferson Lakes will be transferred from the existing owners

to Sun Belt and/or its nominee at no cost to Sun Belt. (This has been done.)

B. The transfer will be executed via dations en paiement or a friendly foreclosure, at Sun Belt's option. (This has been done.)

C. All lien holders will release all liens on the project and will furnish a clear lien certificate to Sun Belt, and in consideration for which Sun Belt will pay lien holders $1,200,000, payable as follows:

1. $900,000 cash to be made payable to lien holders and their attorneys at the sheriff's sale or, payable as provided in II(G) below; (This has been done)

2. $300,000 to be paid upon completion of the project, assuming lien holders complete the Jeffersson Lakes project for $5,500,000. The $300,000 will be secured by a mortgage on Jefferson Lakes; provided that nothing herein obligates Sun Belt to finish the project; however, if Sun Belt sells the project before completion, lien holders will be paid their $300,000 upon sale, assuming Sun Belt has not spent in excess of $5.5 million at that time. The contractors on Jefferson Lakes to complete the project will be a joint venture between Quality

Construction and Standard Naylor and/or their assigns.

3. In the event the project is completed for more than $5.5 million, the $300,000 will be reduced, dollar for dollar, for any amount which Sun Belt must pay in excess of $5.5 million to complete the project; and

4. All laborers who have liens on the Jefferson Lakes project will receive 50% of the amount of their liens up to a maximum of $40,000 (from the $900,000 enumerated in II(C) to be divided equitable amount them by their attorneys.

D. At the request of Sun Belt, Dr. Zohdi and Standard Naylor Group, Inc., will guarantee the construction cost to finish Jefferson Lakes for $5.5 million.

E. The owners of Jefferson Lakes will immediately file a notice of abandonment.

F. The lien holders have an option to buy Jefferson Lakes pursuant to the terms of the agreement offered to the lien holders on December 3, 1985. That option shall lapse on June 30, 1986. If that option is not exercised by the lien holders, Bonfanti and Fackrell shall have an option to purchase the property pursuant to an agreement executed by the parties on 12/19/85.

In any event, all options to both lien holders and Bonfanti-Fackrell, if not exercised by June 30, 1986, will expire.

G. Payment to the lien holders will be made on the earlier of (1) thirty days after the notice of abandonment; provided that lien holders have provided a clear lien certificate and complied with all terms of this agreement by that time; or (2) the sheriff's sale, which shall be set as soon as possible. (This has been done.) The $900,000 will be secured by either Sun Belt's letter of credit or a mortgage on the Jefferson Lakes' property, to which Sun Belt will subordinate its mortgages, at the option of lien holders.

H. The lien holders will release the record owners of Jefferson Lakes from any and all lien claims or any other personal liability which they may have arising under state or federal law.

I. The lien holders will release Sun Belt and its present and prior employees, officers, and directors against all claims arising out of the Jefferson Lakes project.

J. The lien holders agree to release all claims against any bond companies of any other lien holders on Jefferson Lakes. Southern Electric Supply, Inc. of Delaware reserves its right under open account against C & C Electric of Baton Rouge, Inc.

K. In the event there are any lien holders who refuse to comply with the terms of this agreement and/or who refuse to execute the releases provided for herein, and provided there is joint consent of Sun Belt Savings Bank and the record owners of Jefferson Lakes, the Jefterson Lakes property will be sold at sheriff's sale, and none of the proceeds of the sale, nor any amount of the $1.2 million payable by Sun Belt shall be paid to such lien holders.

III. TERMINATION OF LITIGATION AND RELEASE OF ALL CLAIMS

Contingent upon confirmation of the bankruptcy plan outlined above and contingent upon the occurrence of the Jefferson Lakes settlement, the following claims and litigation will be released:

A. CLAIMS

1. All defendants in the Federal Civil RICO suit will dismiss Sun Belt, its agents, officers, directors, employees, and attorneys from any claims arising out of the RICO suit, including, but not limited to, actions for defamation, malicious prosecution, loss of business, etc.

2. Bonfanti, Fackrell, the Baums, Stewart, all related Bonfanti-Fackrell entities, Sun Belt, and its related and subsidiary companies will release all claims against each other and against any lien holders.

3. All lien holders on Essen Centre and Jefferson Lakes will release all claims against Bonfanti, Fackrell, the Baums, Stewart, all related Bonfanti-Fackrell Companies, Sun Belt and its related companies, as well as Sun Belt's present and prior management; provided that, however, not withstanding anything contained in this paragraph or in any other portion of this agreement, J. F. Naylor Company, Inc. Reserves its rights against prior Sun Belt management and other parties as set forth in an agreement between Naylor and Sun Belt dated December 23, 1985, incorporated herein by reference.

B. LITIGATION

Contingent upon the above claims being dismissed, the following litigation will be dismissed:

1. Sun Belt's litigation against James Dodds, BFC 8, Ltd., Noel B. Baum, Janet Ferracci Baum, V. James Stewart, Gerald Fackrell, George Bonfanti, and any related Bonfanti-Fackrell entity will be dismissed with prejudice;

2. Sun Belt's pending litigation against Harry Adcock will be dismissed without prejudice and against Larry Tullos will be dismissed with prejudice;

3. Bonfanti, Fackrell, the Baums,

Stewart, and all present or prior related Bonfanti-Fackrell entities will release with prejudice all litigation against Sun Belt, its related or affiliate companies, and against all lien holders; and

4. lien holders on both Essen Centre and Jefferson Lakes will dismiss with prejudice any existing litigation against Sun Belt, its related and subsidiary companies, the record owners of Essen Centre and Jefferson Lakes, all Bonfanti-Fackrell related companies and other lien holders arising out of the Essen Centre and Jefferson Lakes projects; provided that, however, J.F. Naylor Bros. Company, Inc. and LCR Corporation agree that any rights flowing from the personal guarantees executed by Rusty Wharton and Tom Iglehart will remain in full force and effect. Any claim of LCR corporation shall be reduced by the amounts received by them by virtue of them being a lien holder.

IV. ADDITIONAL MATTERS

additional matters will be governed by the agreement executed between the Bonfanti-Fackrell interest and Sun Belt on 12/19/85.

V. APPROVAL OF THE FEDERAL HOME LOAN BANK BOARD

Sun Belt's ability to comply with this agreement is subject to approval by the Federal Home Loan Bank Board which was granted on December 23, 1985, at 9:00 A.M.

J.F. Naylor Bros. Company, Inc.'s compliance is subject to approval of the United States Bankruptcy Court.